No. 2828

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers, Agents, Employees and All Persons Acting By, Through or Under It or In Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

Upon Appeal from the United States District Court For the District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
of Juneau, Alaska,

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of Seattle, Washington,

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Solicitors for Appellant.

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Come now the appellants and respectfully petition this Court for a rehearing for the reasons following:

In the case of *Weber vs. Harbor Commissioners,*

18 Wallace, page 57, the following language quoted by the Court in their opinion was used:

> "In the absence of such legislation or usage, however, the common law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is, in England, in the King, and in this country, in the state. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a *purpresture,* which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

This is undoubtedly a correct statement of the law as applied to the facts in the case then before the Court but the public right of fishery was not then under consideration. In cases like the present where that right is involved the decision in the case of *Weber vs. Harbor Commissioners* must be read in the light of subsequent decisions by the Supreme Court.

In the case of *Mission Rock vs. United States,* 109 Fed. Rep. 768, this Court had occasion to construe the meaning of the language quoted from the case of *Weber vs. Harbor Commissioners,* and Judge Ross, speaking for the court, says:

"In view of the decision of the Supreme Court in the case of *Illinois Central Ry. Co. vs. Illinois, supra,* the right of the state to dispose of such lands, however, does not seem to be as broad as it was declared to be in the case of *Weber vs. Board.*"

In the case of *Illinois Central Ry. Co. vs. Illinois,* 146 U. S. 387, to which Judge Ross refers, the question before the court was whether a grant of submerged lands made by the State of Illinois to the Illinois Central Railway Company was valid. The court held that this grant could not be sustained because it interfered with the public rights of navigation and fishery. It was held that while the state might grant small areas necessary to serve as foundations for wharves to be constructed in aid of navigation, it could not substantially impair the public right of navigation or the public right of fishery. The opinion was written by Justice Field, who also wrote the opinion in the case of *Weber vs. Harbor Commissioners,* so that what was said in the Illinois Central case must be considered as supplementary to what was said in the case of *Weber vs. Harbor Commissioners.*

With reference to the character of the title by which the state holds the submerged lands and the rights of the whole people therein, Mr. Justice Field says:

"That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under the tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the creation of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly consid-

ered and sustained in the adjudged cases as a valid exercise of legislative power—consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used to promote the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied to not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of

absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particlar cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and preservation of the peace."

The effect of this decision as well as other decisions bearing upon the precise question involved in this case was fully discussed in the brief filed by Messrs. Hellenthal & Hellenthal on behalf of the appellants, on page 26 et seq. and we again call the court's attention to these pages in this connection. It was there pointed out from the authorities that the whole people of Alaska, including all others, as well as the Metlakahtlans, have a common right of

fishery in the navigable waters situated within the Territory and that neither Congress nor the President have the right to substantially impair this common right.

Referring now to the case of *Commonwealth vs. Manchester,* cited by the court in their opinion, and relied upon as authority for the decision, we have to say: that while the government, be it state or national, holds the title to the navigable waters and their underlying beds in trust for the benefit of the whole people who have therein the common right of navigation and fishery; the sovereign has the right to regulate the use of these fisheries, not with a view of destroying the fisheries, or of impairing the public right or of excluding one portion of the public in order that the balance may have a monopoly, but with a view of making the fisheries more valuable to the whole people.

The government has what is termed the *jus regium.* The character and extent of the right of the government in connection with the fisheries was dealt with by the Supreme Court of New Jersey in the case of *Arnold vs. Munday,* where it was said:

> "And I am further of opinion, that, upon the Revolution, all these royal rights became vested in the people of New Jersey, as the sovereign of the country, and are now in their hands; and that they, having themselves, both the legal title

and the usufruct, may make such disposition of them, and such regulation concerning them, as they may think fit; that this power of disposition and regulation must be exercised by them in their sovereign capacity; that the legislature is their rightful representative in this respect, and, therefore, that the legislature, in the exercise of this power, may lawfully erect ports, harbours, basins, docks and wharves on the coasts of the sea and in the arms thereof, and in the navigable rivers; that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks and bridges for the improvement of the navigation and the ease of passage; that they may clear and improve fishing places, to increase the product of the fishery; that they may create, enlarge and improve oyster beds, by planting oysters therein in order to procure a more ample supply; that they may do these things, themselves, at the public expense, or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments; but still this power, which may be thus exercised by the sovereignty of the State, is nothing more than what is called the *jus regium,* the right of regulating, improving, and securing the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently, with the principles of the law of

> nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by the free people."

The decision in this case was not only spoken of in the highest terms by Chief Justice Taney in rendering the decision of *Martin vs. Wardell,* but in the case of the *Illinois Central Railway Co. vs. Illinois,* Mr. Justice Field refers approvingly to that portion of the opinion above quoted.

While the government, be it state or national, therefore, has no right to impair the public right of fishery, it has a right to regulate the manner in which this right shall be exercised, and this is all that the State of Massachusetes did when it enacted the statute that was under discussion in the case of *Manchester vs. Commonwealth.* This is clearly evident from the language of the Supreme Court of the United States in rendering the opinion. In the course of the opinion it is stated:

> "If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States (upon which we express no opinion), the statute may well be considered as an impartial and reasonable regulation of

> this liberty; and the subject is one which a state may well be permitted to regulate within its territory, in the absence of any regulation of the United States."

It is shown from the opinion, therefore, that the question of whether the people of the United States had a common right of fishery was neither considered nor decided by the court but that it was merely held that this right might be regulated.

It is not contended in the case at bar that Congress has not the power to regulate the manner in which the public right of fishery may be exercised in the waters of Alaska, but it is contended that neither the Congress nor the President has the power to exclude the whole people from the exercise of the right in order that a particular person or a class of persons may have the exclusive right to exercise it.

Referring now to the point made in the opinion that the fish trap is in any event a purpresture, we direct the Court's attention to two things: In the first place, the fish trap is an ordinary and usual appliance used by fishermen in the exercise of their common right of fishery and if it is conceded that the common right of fishery exists, and upon this question there can be no doubt, it must follow that in the exercise of this right a citizen may employ such appliances as may be reasonably necessary to enjoy the right.

In the case of *Lincoln vs. Davis,* 53 Mich. 375, the right of fishermen to drive stakes in the ground and construct a fixed fishing appliance in all respects similar to a fish trap was considered and in the course of the opinion by Judge Campbell, concurred in by Judge Cooley, it was said:

> "Outside of the statutory line I think there can be no doubt of the right of any one to fish with such appliances as are appropriate to open-water fishing. It has always been customary on these lakes to treat deep-water fishing and navigation as resting on the same basis, except in narrow waters or near shore, where fixed apparatus might have some relation to riparian occupancy as used in connection with it. Fishing such as was involved in this controversy has no natural connection with the dry land or its approaches. It is carried on altogether by the aid of vessel or boat navigation, and is fairly incidental to that class of business."

The other point to which we direct the Court's attention in this connection is that Congress has given its express sanction to the construction of fish traps in Alaska waters.

Sections 261 and 262, Chapter 3, of the Compiled Laws of Alaska, are as follows:

> "Sec. 261. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap,

fish wheel, or fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five yards of the mouth of any red salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed."

"Sec. 262. It shall be unlawful to lay or set any drift net, seine, set net, pound net, trap, or any other fishing appliance for any purpose except for purposes of fish culture, across or above the tide waters of any creek, stream, river, estuary, or lagoon, for a distance greater than one-third the width of such creek, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red salmon stream where the same is less than five hundred feet in width. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards lat-

> erally or within one hundred yards endwise of any other trap or fixed fishing appliance."

Since Congress has expressly regulated and sanctioned the use of the fish trap, the fish trap cannot be a purpresture, because it was established pursuant to and under the sanction and regulation of Congress.

In relation to the point that the trap was constructed without obtaining the consent of the Secretary of War under the Rivers and Harbors Act, we respectfully ask the Court to give consideration to the finding of the trial court as follows:

> "Said trap is in navigable water of the United States technically speaking, it is not within any portion of the waters of the United States which are, or ever have been, used for the purposes of navigation, and is not in, and is not an obstruction to the navigable capacity of, any of the waters of the United States in the sense used in the Rivers and Harbors Act approved March 3, 1899." (Record, p. 189.)

The evidence proves that the trap is located on a rocky reef, a place to be avoided by all navigators. (Record, p. 98.)

Section 10, of said Act, only prohibits obstructions to the navigable capacity of the public waters, and any structures in "any port, roadstead, haven,

harbor, canal, navigable river, * * * " except on plans authorized by the Secretary of War. These particular words plainly indicate the will of Congress as to the scope of the Act with respect to the different localities to which the prohibition applies. The general words following the particulars certainly do not have effect to extend the law to cover all the waters within the national dominion, nor to require all useful structures in water to be on plans approved by the Chief of Engineers and approved by the Secretary of War.

The Act is one to which the rule of *ejus dem generis* is naturally and necessarily applicable and controlling.

Missouri Pacific Ry. Co. v. United States, 211 Fed. Rep. 893—896-7. The decision in this case quotes an excerpt from the opinion of Chief Justice Marshall in *United States vs. Bevans,* 3 Wheat. 336, 4 L. Ed. 404, which bears directly and strongly on this case.

In the report of the case of *United States vs. Midwest Oil Co.,* 236 U. S. 459, mention is made of the fact that prior to 1910 at least 252 reservations for useful, though non-statutory, purposes had been made by the President.

It is true that the President, in the exercise of his power as the business manager and sales agent of the government as a land proprietor, has frequently

made reservations and withdrawn from sale public land. In some instances such acts have been legitimate, in some instances they have been ratified by Congress, in some instances their validity has been affirmed in judicial proceedings, and in some instances the unwarranted exercise of such power has been condemned as unlawful by the Supreme Court. It is enough to cite one instance of the kind and we again refer the Court to the case of *Nelson vs. N. P. Ry. Co.,* 188 U. S. 108. And in some instances the executive branch of the government has on the advice of able Attorney Generals refused to encroach upon the common rights of all the people by the exercise of despotic power. An instance of that kind was when Attorney General Garland rendered an opinion worthy of a lawyer of his prestige denying the power of the President to make a reservation of Annette Island for the Metlakahtlans.

We find a similar instance not heretofore cited to the Court, in 44 Land Office Decisions, p. 441. That is a decision of the Commissioner of the General Land Office, approved by an Assistant Attorney General, holding that the executive branch has no power to make a reservation of shore lands in Alaska for the benefit of Indians.

Any number of executive acts, whether valid, questionable, or invalid, do not establish the rightfulness of an executive proclamation which usurps

power not vested in the President by the Constitution or any law.

THERE IS NO EQUITY IN THE BILL.

Apparently, the facts of paramount importance have not been considered, and the lack of prime essential in a bill for an injunction has been overlooked.

Four thousand dollars was expended in constructing this trap, after an assurance that the Secretary of the Interior would not attempt to create monopolistic rights in the fisheries surrounding Annette Island and before the issuance of the proclamation. (Record, pp. 118-119.)

The trap was constructed with due observance of the regulations prescribed by Act of Congress and it does not encroach upon any public or private right; and it is a recognized legitimate means of carrying on the fishing business in Alaska.

The proclamation declares that the reservation is a necessary adjunct of a cannery which the Secretary of the Interior proposed to establish on the Island; there is no cannery on the Island; Congress refused to make an appropriation providing the necessary funds for building a cannery; the scheme of carrying on the fish canning business for the benefit of Metlakahtlans under a lease has been abandoned by the lessee and the whole flimsy case, made

CERTIFICATE.

I, Cornelius H. Hanford, an attorney at law admitted to practise in the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that I am of counsel for the appellant in the above entitled cause; that in my judgment the foregoing petition for a rehearing of said cause is well founded and that it is not interposed for delay.

Cornelius H. Hanford

Of Counsel for Plaintiff in Error.

out of affidavits mostly by the attorneys representing the government, has collapsed.

In lieu of equitable grounds for an injunction, we are told in the concluding paragraph of the Court's opinion that the appellant has no right vested or otherwise to construct or maintain a fish trap within the waters reserved by the President's proclamation.

It is a bitter pill that a citizen must take, when arrogant officials order him to vacate ground where by the laws of his country all have common and equal rights, in order that a band of aliens may monopolize Nature's bounty. We regret that representatives of the government prosecuting the case have not been impressed with a sense of injustice in pursuing a course destructive of invested capital and discouraging to enterprise in the conservation of food at a time when a hungry world is crying for it.

As though might were right, the government, in a Court of Chancery, stands like a monarch asserting its power, as the all-sufficient reason for committing robbery in order to bestow a gratuity.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,
C. H. HANFORD,

Solicitors for Appellant.